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In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-404

ILLINOIS BRICK COMPANY, AMERICAN BRICK CO., AMPRESS BRICK CO., INC., ANJO, INC., CHICAGO BLOCK CO., INC., E. L. RAMM COMPANY, HEIGHTS BLOCK, INC., JOLIET CONCRETE PRODUCTS, INC. AND NORTHFIELD BLOCK CO.,
Petitioners,

vs.

STATE OF ILLINOIS, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

Brief of State of California Through Its Attorney General, Evelle J. Younger Amicus Curiae

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INTEREST OF THE AMICUS CURIAE

The District Court below granted defendants' motion for summary judgment holding that the State of Illinois and certain of its political subdivisions lacked standing under Section 4 of the Clayton Act (15 U.S.C. § 15) to sue for alleged price-fixing on concrete blocks used in public building contracts. The alleged violation occurred at the manufacturing level. The District Court concluded that plaintiffs were too remote, where the concrete block had been physi-

cally transformed into one of the components of a public building. *State of Illinois v. Ampress Brick Co., Inc.*, 67 F.R.D. 461, 468 (N.D. Ill. 1975).[1]

Defendants here do not press the reasoning of the District Court, and instead seek to support the decision by reference to *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Defendants raise in effect a passing-on type defense. They now argue that, even assuming plaintiffs have standing, that they can prove the alleged price fixing conspiracy, and that the conspiracy resulted in an illegal overcharge, plaintiffs still may not recover because they are precluded as a matter of law based on *Hanover* from showing injury. Defendants, in short, would defeat liability by barring plaintiffs from proving at trial that the alleged overcharge was passed on to them.

This Court would destroy a whole class of treble damage actions, and would leave state and local governmental entities dangerously exposed to abusive price-fixing conspiracies, if it were to uphold summary judgment on either the "standing" ground offered by the District Court or on the basis of the "passing-on" defense now offered by defendants. Acceptance of the rationale underlying defendants' arguments indeed would threaten the continued vitality of all private treble damage actions.

The State of California has brought a number of treble damage actions involving materials used in public construction contracts, to wit: concrete and steel water pipe, liquid asphalt, gypsum products, acoustical ceiling tile, resilient floor covering, plumbing fixtures, steel rebars, and cement. California's ability to protect itself adequately

1. The Court of Appeals reversed, finding that the Illinois plaintiffs did not lack standing, and that they should be allowed to prove their case at trial. *State of Illinois et al., v. Ampress Brick Co., Inc. et al.*, 536 F.2d 1163 (7th Cir. 1976)

from future price-fixing conspiracies depends on this Court's affirmation of the right of Illinois to bring suit in this case.

California, furthermore, through its Attorney General has a substantial interest in promoting enforcement of the antitrust laws through private treble damage actions. This Court should reject defendants' arguments for upholding the District Court's decision in order to prevent impairment of all private treble damage actions.

QUESTIONS PRESENTED

(1) Whether, after *Hanover Shoe,* an antitrust defendant may defeat liability to a legitimate plaintiff who has standing to sue and who otherwise would be entitled to recover an alleged overcharge, by raising as a defense passing-on matters which happen to fall before rather than after the plaintiff in the chain of distribution.

(2) Whether defendants are entitled to summary judgment, even conceding their interpretation of *Hanover Shoe,* without foreclosing the very real possibility that the award of a competitively bid public construction contract operates as a cost-plus contract to pass-on to the State or other awarding authority the full amount of material costs, including any overcharges.

SUMMARY OF ARGUMENT

Defendants raise a passing-on defense in direct contravention of the principles established in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). This Court in *Hanover* rejected a passing-on defense by a guilty defendant who offered to show that plaintiff had passed-on the alleged overcharge to others subsequent in the chain of distribution. 392 U.S. at 494. The Court at the same time established the overcharge as the proper measure of dam-

ages in a price-fixing case. 392 U.S. at 491, 494. Defendants would turn *Hanover Shoe* on its head by using it as a barrier to preclude, as a matter of law, plaintiffs who happen to fall subsequent in the chain of distribution from bringing treble damage actions. Defendants here would defeat liability by raising matters of passing-on which occur before plaintiffs in the chain of distribution, while in *Hanover* defendants sought to raise matters of passing-on which occurred after plaintiff. Defendants here as a corollary are saying that the proper measure of damages in a price-fixing case for a plaintiff other than the immediate purchaser is not the overcharge, but instead the overcharge subject to proof of passing-on matters. Defendants thus are using, and would continue to use in the future, *Hanover* as a basis for forcing plaintiffs and the courts into the evidentiary quagmire rejected by *Hanover*.[2]

The only distinction between the defense raised here and the defense rejected in *Hanover* is that the passing-on matters here happen to fall in front of rather than behind the plaintiff. The distinction is without a difference, for, as this Court could not make any clearer, it is irrelevant under the antitrust laws where a plaintiff happens to fall in the chain of distribution. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 649 (1969). See also *Radovich v. National Football League*, 352 U.S. 445, 454 (1957); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

The Court in *Hanover* was impelled to its decision by (1) the importance of preserving the effectiveness of pri-

2. Defendants in certain multidistrict litigation cases following *Hanover* have been equally successful in bringing about months, even years, of discovery on the pass-on question. See *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973); *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680.

vate treble damage actions, 392 U.S. at 494, and (2) the necessity of avoiding the evidentiary difficulties ordinarily inherent in proving the extent, as opposed to the fact, of passing-on. 392 U.S. at 492, 493. These considerations underlying *Hanover* operate here to allow the Illinois plaintiffs to prove the fact and amount of their injury. The difficulties of proof described in *Hanover*, furthermore, do not exist for a plaintiff attempting to prove matters of pass-on as part of his case.

Summary judgment is improper in any case because, even if *Hanover* is considered applicable as interpreted by defendants, defendants have failed to foreclose the existence of a situation within the "cost-plus" exception noted in the opinion. 392 U.S. at 494. Several prominent decisions demonstrate the similarity between cost-plus contracts and public construction contracts awarded pursuant to competitive bids.

Defendants attempt to fill the vacuum created by the absence of a factual record here by reference to the facts used or assumed in their particular selection of cases, to wit: *Hanover Shoe*, supra, and *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970), aff'd per curiam sub nom., *Mangano v. American Radiator & Standard Corp.*, 438 F.2d 1187 (3rd Cir. 1971). Counsel for Illinois plaintiffs disputes the defendants' version of the facts regarding the passing-on of material costs to the State or other awarding authority in a competitively bid public construction contract, thereby raising a factual issue sufficient to defeat summary judgment. The State of California, however, as Amicus respectfully disagrees with counsel for both plaintiffs and defendants regarding what the factual record, if developed, would likely show. We submit that neither version of the

facts by counsel is particularly accurate in relation to the real world of competitively bid public construction contracts. See e.g., *In re Western Liquid Asphalt Cases,* 487 F.2d 191 (9th Cir. 1973); *Armco Steel Corp. v. State of North Dakota,* 376 F.2d 206 (8th Cir. 1967); *In re Master Key Antitrust Litigation,* 1973-2 Trade Cas. ¶ 74,680; *Drennan v. Star Paving Co.,* 51 Cal.2d 409, 333 P.2d 757 (1958). California asserts its independent position on the facts because it believes that any decision by this Court on an antitrust matter should be on a factually sound basis, *State of Minnesota v. United States Steel Corp.,* 438 F.2d 1380 (8th Cir. 1971), in order to aid the Court in determining the economic realities of the situation. *United States v. Phosphate Export Assoc.,* 393 U.S. 199, 208 (1968).

The long established policy in favor of private treble damage actions requires affirmance of the right of Illinois to bring its action to trial.

ARGUMENT

I.

Defendants Here Are Attempting to Raise a "Passing-On" Type Defense in Direct Contravention of the Principles Established in Hanover Shoe.

Defendants here would as a matter of law preclude the State of Illinois and other Illinois plaintiffs from proving the impact and damages elements of their cases. Defendants base their position on *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968). Defendants in effect are simply raising a passing-on defense which is directly contrary to the principles established in that case.

Hanover Shoe contains two basic holdings. The first is that an antitrust defendant, having violated the law, will normally not be allowed to defeat recovery of the result-

ing overcharge by one to whom he sold his goods by attempting to show that his buyer had "passed-on" the illegal overcharge to others in the chain of distribution. 392 U.S. at 494. The only exception exists where it is "easy" to prove the buyer has not been damaged, such as where the "overcharged buyer has a pre-existing 'cost-plus' contract. . . ." 392 U.S. at 494. The second holding, closely tied to the first, is that the proper measure of the buyer's damages in an overcharge case is the full amount of the overcharge. 392 U.S. at 491, 494.

The expressed underlying rationale for the holdings in *Hanover* was (1) the importance of preserving the effectiveness of private treble damage actions, 392 U.S. at 492, and (2) the need to avoid the usual evidentiary difficulties inherent in proving the extent of a pass-on. It is better that plaintiff receive a possible windfall than allow a guilty defendant to "retain the fruits of . . . [his] . . . illegality. . . ." Id., at 494.

It is well established by other decisions of this court that it is irrelevant for antitrust purposes where in relation to the defendant plaintiff happens to fall in the chain of distribution. *Perkins v. Standard Oil Co.,* 395 U.S. 642, 647 (1969). The right to bring suit under the antitrust laws is not limited to any particular class or categories of persons. *Radovich v. National Football League,* 352 U.S. 445, 454 (1957); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948).

Hanover Shoe thus established two basic principles of antitrust law when viewed in light of other antitrust cases. The first principle established by *Hanover* is that a guilty defendant, faced with a plaintiff who has standing to sue, and who can prove defendant's violation and that he in-

curred some injury as a result thereof,[3] may not thereafter attempt to defeat plaintiff's recovery of his damages by raising a "passing-on" type defense. It is wholly irrelevant to that principle that the plaintiff may fall subsequent in the chain of distribution rather than immediately following the wrongdoer so that the "passing-on" matters raised by defendant occur before rather than after plaintiff has incurred injury.

It is important not to confuse matters of "standing" with the passing-on defense rejected in *Hanover*. Genuine issues of "standing" may arise in cases where for reasons other than the principles established in *Hanover* the plaintiff may be considered too "remote". There may be wholly independent intervening markets for instance, involving the purchase by plaintiff of a product wholly unrelated to the product sold by defendant. See e.g., *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.,* 315 F.2d 564 (7th Cir.), cert. denied sub nom, *Illinois v. Commonwealth Edison Co.,* 375 U.S. 834 (1963). The District Court below in effect found a "standing" problem here unrelated to any matter arising from *Hanover Shoe* when it concluded plaintiffs were too "remote" because a public building was different than the concrete blocks from which it was made. 67 F.R.D. at 461.

The Court of Appeal, it is submitted, correctly rejected the District Court's decision and the defendants appropriately abandon the position here. The Illinois plaintiffs

3. Satisfaction of the "causation" requirement through proof of "injury" in every overcharge case, including in a first-purchaser case such as *Hanover,* is a matter of showing that the overcharge, assuming its existence, was "passed-on at least in part" to the plaintiff. *Perkins v. Standard Oil Co.,* supra at 649. Proof of "passing on" by one immediately following the wrongdoer may be a simpler matter than for one further removed in the chain of distribution, but he must still prove it. Cf. 392 U.S. at 489.

clearly satisfy any reasonable test for "standing", whether it be the "target area" or "direct injury" test. The plaintiffs necessarily were the known objects of the alleged conspiracy, and suffered the full brunt of its impact. See Argument II, infra.

The second teaching of *Hanover* when considered in light of other decisions of this Court is that a plaintiff who has standing, regardless of where he stands in the chain of distribution, who proves defendant's violation of the antitrust laws, and that he, plaintiff, suffered some injury as a result thereof, is normally entitled to recover the whole overcharge. The proper measure of damages in an overcharge case is the overcharge. It is irrelevant where plaintiff stands in the chain of distribution. *Perkins v. Standard Oil Co.,* supra at 647. See also *Radovich v. National Football League,* supra at 454; *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* supra at 236. *Hanover,* by holding that the extent to which plaintiff may have passed-on an illegal overcharge is irrelevant, 392 U.S. at 494, at the same time established the principle that the extent to which the overcharge may have been passed-on to the plaintiff is equally irrelevant to the proper measure of damage.[4]

Defendants' position here is thus clearly contrary to the principles of *Hanover*. Defendants simply raise a pass-on type of defense in order to defeat recovery by plaintiffs who assumedly can satisfy the standing and prove the violation elements of their case, and, who otherwise would be allowed to prove the impact and damages elements in accordance with established principles of antitrust law.

Defendants cling to a weak reed in *Hanover* in order to avoid the clear effect of the above principles. Defendants

4. Any other result in either case would allow the wrongdoer, faced with liability to an otherwise legitimate plaintiff, to keep the fruits of his illegality. See 392 U.S. at 493.

argue that the evidentiary difficulties described in *Hanover* for defendants there present an equal obstacle for all plaintiffs other than the one who purchases from defendant. Defendants would thus pervert the purposes of the Court in *Hanover* by using it to obstruct the bringing of such actions. *In re Master Key Antitrust Litigation,* 1973-2 Trade Cas. ¶ 74,680, at 94,979.

Defendants overlook several important factors in making their argument. First, those policy considerations served by rejecting the passing-on defense attempted in *Hanover* operate here to permit plaintiff to prove such matters where necessary. The need of an antitrust plaintiff to delve into pass-on questions, furthermore, is limited. And the standard of proof imposed on defendants in *Hanover,* appropriately high to prevent the defeat of liability by an admitted wrongdoer, is wholly inappropriate to the proof of his case by an antitrust plaintiff.

The only occasion for a plaintiff removed from defendant in the chain of distribution to raise passing-on matters relates to his need to prove the fact of his injury. Such a plaintiff must establish "impact" by demonstrating that the overcharge was "passed-on, at least in part" to him through the chain of distribution. See *Perkins v. Standard Oil Company,* 395 U.S. 642, 649, 650 (1969). See also *In re Western Liquid Asphalt Cases,* 487 F.2d 191, 199 (9th Cir. 1973); *In re Master Key Antitrust Litigation,* 528 F.2d 5, 12, n. 11 (2d Cir. 1975).

Proof that an overcharge was "passed-on, at least in part" is on its face a lesser matter than that undertaken by the defendant in *Hanover.* The defendant in *Hanover* offered to prove not just the fact of pass-on, but also its extent. His success would have thus depended on pro-

tracted proceedings involving the presentation of massive evidence and complicated theories. 392 U.S. at 493.

The pass-on question after *Hanover,* as shown above, can have no logical application to proof of damages sustained by a plaintiff in an antitrust case. The proper measure of damages in an overcharge case is the overcharge.

This Court, furthermore, did not find the problems of proof in *Hanover* insuperable without first establishing an unusually high standard of proof. The Court imposed on the guilty defendant the requirement that it prove pass-on directly as a matter of demonstrable fact, and not as a matter of mere inference or economic theory. 392 U.S. at 492-493.[5]

The Court's purpose, of course, in imposing the high standard of proof was to prevent the wrongdoer from escaping liability to a legitimate plaintiff. This Court in the past, for the same purpose, has relaxed the standard of proof for a legitimate plaintiff attempting to show his damages. *Bigelow v. RKO Radio Pictures,* 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555 (1931).

The basis for the difference in treatment is the importance of treble damage actions, and because it was defendant himself, through his wrongful conduct, who has created the difficulties of proof. See *Bigelow v. RKO Radio Pictures,* supra at 265; *Story Parchment v. Paterson Parchment Paper Co.,* supra at 563. Cf. *Hanover Shoe,* supra at 494. Defendants here for the same reasons should not be allowed to use any difficulties of proof they have

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5. There is no mention in the Court's opinion of the right to go to the jury on the basis of substantial evidence, regardless of whether it is direct or circumstantial, nor is there mention of the ordinary "preponderance of the evidence" standard in civil cases.

created by their wrongful conduct to protect themselves from liability to otherwise legitimate plaintiffs.

Defendants' attempt here to raise a passing-on type defense should be rejected for all the above reasons. The possibility under the above principles that more than one level may seek recovery of the same overcharge is no proper concern of defendants. The Court of Appeal below correctly assessed the problem as one of apportionment between those who have sued. 536 F.2d at 1167.

II.

The Award of a Public Construction Contract Pursuant to Competitive Bidding Would Fall Within the Exception Recognized in Hanover Shoe in Any Case.

Hanover Shoe, even if it operates to prevent the normal plaintiff removed in the chain of distribution from proving his case, contains an important exception, as follows:

> ". . .[T]here might be situations—for instance, when an overcharged buyer has a pre-existing 'cost plus' contract, thus making it easy to prove that he has not been damaged — where the considerations requiring that the passing on defense not be permitted in this case would not be present." 392 U.S. at 494.

The Ninth Circuit, in a case involving the award of public road construction contracts pursuant to competitive bidding, after noting the above exception, stated flatly, "Ours is such a case." *In re Western Liquid Asphalt Cases, supra,* at 196.

The Ninth Circuit had before it facts based on affidavits and other evidence showing in detail the operation of the competitive bidding process as to public construction projects. This Court has before it no such facts, but their absence is defendants' responsibility.

The District Court below denied "standing" to the Illinois plaintiffs on the simple fact that plaintiffs ended up with buildings while defendants had sold concrete blocks for use in those buildings. 67 F.R.D. at 467. The Court of Appeals below found "standing" on the fact that plaintiffs as "ultimate consumers" of the product were, in effect, within the "target area" of defendants' alleged conspiracy. 536 F.2d at 1167.

Defendants now rely improperly in this Court on new facts not considered by either Court below. Defendants rely on facts found or assumed in other reported cases without regard to the absence of those facts in the record of this case, to wit: *Hanover Shoe,* supra, and *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.,* 50 F.R.D. 13 (E.D. Pa. 1970), aff'd per curiam sub nom., *Mangano v. American Radiator & Standard Corp.,* 438 F.2d 1187 (3rd Cir. 1971). Defendants significantly ignore the related cases dealing with the "passing-on" question in the context of the award of public construction contracts. See e.g., *In re Western Liquid Asphalt Cases, supra; Armco Steel Corp. v. State of North Dakota,* 376 F.2d 206 (8th Cir. 1967); *In re Master Key Antitrust Litigation,* 1973-2 Trade Cas. ¶ 74680.

Defendants' reliance on selected cases for their facts is in derogation of their burden on summary judgment of establishing their right to judgment based on established principles of law; they must show the absence of any genuine issues of material fact. *Adickes v. Kress & Co.,* 398 U.S. 144, 153, 156-158 (1970); *Island Equipment Land Co. v. Guam Economic Development Authority,* 474 F.2d 753, 756 (9th Cir. 1973). See also 6 Moore's Federal Practice ¶ 56.22 [2]. Defendants' burden is particularly great where, as here, the issue is of "critical" importance, *Askew v. Hargrave,* 401 U.S. 476 (1971), raises matters of "public" im-

portance, *Eccles v. Peoples Bank of Lakewood Village,* 333 U.S. 426, 434 (1948), and is left in considerable doubt because of conclusions found in several prominent cases. See *In re Western Liquid Asphalt Cases, supra; Armco Steel Corp. v. State of North Dakota, supra; In re Master Key Antitrust Litigation,* supra.

The problem of an inadequate record is compounded by what is, in the view of the State of California, a less than accurate depiction of the probable facts by counsel for either side. Counsel for plaintiffs fails to clarify that the pertinent reported decisions show that the manufacturer does not *sell* his product until *after* award of the general contract by the State, and that the bid submitted upon which the award is made incorporates the full cost of materials, here concrete block, including any possible overcharge. This Court's application of the cost-plus exception in *Hanover* to a case involving the award by the State and local governments of public construction contracts should not be made without a full and accurate factual record in order to establish the economic realities involved. *United States v. Phosphate Export Assoc.,* 393 U.S. 199, 208 (1968). See also *State of Minnesota v. United States Steel Corp.,* 438 F.2d, 1380 (8th Cir. 1971).

The facts and analyses set forth in the *Asphalt, Armco Steel* and *Master Key* cases show that the award of a public construction contract based on competitive bids operates as to the awarding authority in a manner indistinguishable from a preexisting cost plus contract, at least as to the passing on of illegal overcharges in the price of materials used in the project. The operative event is award of the contract. The pass-on is complete, and full damage is inflicted upon the awarding authority upon award of the general contract before the product has moved from any-

one's hands, and quite possibly even before it has been manufactured.

Contractors and subcontractors carry no inventory of materials to be incorporated in public works projects. They commonly compute material costs in preparation of their bids by obtaining quotes from the manufacturers or other material suppliers; there is no basis for them to exercise an "independent pricing decision" as to such materials. *In re Western Liquid Asphalt Cases, supra* at 195, n. 4; *Armco Steel Corp., supra* at 210, 211; *In re Master Key Antitrust Litigation, supra* at 94981. See also, *Drennan v. Star Paving Co.,* 51 Cal.2d 409; 333 P.2d 757 (1958).

Contractors likewise carry no inventories of completed public projects. Contractors do not construct public buildings in the hopes of finding a buyer. Contrary to defendants' vigorous assertions here, contractors do not operate in a market involving independent pricing decisions applied to public buildings.

Material costs, including any illegal overcharges, thus are automatically and mechanically passed on to the State or other awarding authority through the competitive bidding process. The stage is set for the infliction of injury at the time of contract award. All that is necessary to complete the infliction is to build and pay for the project.

The damage is not undone by subsequent events. There are three possibilities.

The price paid by the contractor at the time of actual purchase for incorporation of the material into the project may stay the same as the price quoted to and used by the contractor in the preparation of his bid.[6] The price paid

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6. This is the most likely occurrence. See *In re Western Liquid Asphalt Cases, supra* at 195. ("In any case, sub-bids from suppliers and subcontractors are regarded as firm.") *Drennan v. Star Paving Co.,* 41 Cal.2d 409, 33 P.2d 757 (1958). (Contractor as a matter of state law is entitled to enforce quotations or sub-bids.)

by the contractor may be less than that quoted, or, finally the price to the contractor may have gone up. The State's injury remains the same in all cases, however, because the State pays for the project based on the total contract price which in turn was based upon the original quotation by the supplier to the contractor or subcontractor. *In re Western Liquid Asphalt Cases, supra,* at 195. See also *Drennan v. Star Paving Co., supra.* Analysis of the pass-on question where competitive bidding is involved in terms of the actual purchase of the material is thus not only misleading, but is positively wrong.

The competitive bidding process precludes a double recovery problem. The state automatically suffers injury to the full extent of the illegal overcharge contained in the material quotes used in preparation of the contractor's bid, and the contractor suffers none. The contractor suffers possible injury only where the price to him for the product is raised after award of the contract. The right of recovery for such possible further injury belongs entirely to the contractor. *In re Western Liquid Asphalt Cases, supra* at 200, 201.

Defendants' failure to foreclose the substantial possibility that the State of Illinois was damaged in a cost-plus fashion through the competitive bidding process should preclude their right to summary judgment. Defendants allow for the possibility under *Hanover* of cost plus situations other than pre-existing cost-plus contracts, but fail to foreclose their possible existence here.

CONCLUSION

Allowance of the "passing-on" defense advanced by defendants here would portend serious consequences for the effectiveness of private treble damage actions. Those most injured, the States, would be greatly impaired in the exercise of their public duty of enforcing the antitrust laws. Moreover, the courts would continue to be clogged by protracted discovery and trial of pass-on issues.

We respectfully submit that the decision by the Court of Appeals, reversing the summary judgment granted by the District Court below, should be affirmed.

Dated: January 21, 1977.

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